Virginia Law Register

VOL. XVI.] OCTOBER, 1910. [No. 6.

DIRECTING VERDICTS.

A member of the legal profession, in the August number of the LAW REGISTER, writes a very interesting essay on "Directing Verdicts." He is evidently a man of learning, for he says that the article is written, "in order to comply with requests from members of the legal profession;" and the essay deserves not only the recognition but the sincere notice of the profession for many reasons. The subject is a live one. The writer seems to think the trial judges of this Commonwealth are now resorting to the practice of directing verdicts, and that in so doing they are intrenching upon the province of the jury; that it is unconstitutional; that it is a departure from the "well-settled, long-established and all-sufficient practice in the courts of this state;" that such practice tends to the prolongation of litigation; that the practice is preventive of the operation of § 3392 of the Code, not allowing more than two trials to the same party; that he knows of no case where the motion to direct a verdict has been sustained, except in damage suits on motion of a defendant corporation.

There is no thoughtful and sincere lawyer, living in our Republic at this day, who will disagree with this learned writer, that in suits between man and man, the trial by jury ought to be maintained; and I will add that the men who compose the juries should be of the highest character and intelligence attainable. The man of our liberty loving race who inveighs against the institution of the jury, in its proper sphere and province, is either a fool or an iconoclast. Upon the other hand, speaking in general, the man who wishes to invest them with power beyond their established and legitimate functions as triers and judges of facts, and facts alone, and the inherent moral and social deductions which naturally flow from them, is a demagogue.

Our judicial institutions (and by this I mean the judges and

the jury) grow out of the same philosophy which pervades the whole of our republican institutions, namely, the *balancing of power.* Like all institutions of the kind, it has slowly evolved, and is steadily evolving, to as near perfection for the preservation of human rights and civil liberty as the unselfish thought and enlightened intellect of mankind can bring it. The trending of modern thought is, *that this is a government, not of a man or any set of men, but of law,* as it was intended to be.

The evolution of the jury system from its primitive to its present state is indeed an interesting as well as an instructive subject, and Messrs. Charles Sumner Lobinger and Alfred Pizey, the learned gentlemen who wrote the chapter on the subject here discussed for the Encyclopaedia of Pleading and Practice (found in volume 6, at page 667) deserve the thanks of the profession.

The wonder is that the learned author of the article in the REGISTER seems so surprised that the *nisi prius* courts are directing verdicts, claiming as he does that such a practice "establishes a novel procedure, which up to this time, has only been indulged in by those judges who have recently started this innovation."

If, in the formation of our courts, as constituted under English jurisprudence, the judges and the jury are to be allowed to maintain their integrity, independence, dignity and usefulness, the demarkation of their respective provinces *must be left alone,* leaving to the jury only questions of fact, and the judge to determine all questions of law. The separation of these respective functions and duties now, being settled universally, the inevitable logical sequence is for the judges to have power to *direct verdicts.*

The power to direct a verdict by the presiding judge, for proper reasons, now clearly defined and prescribed by the law, is at present well-nigh universal in Great Britain, and the States of this Union, as can be seen by anyone who will take the trouble to count and examine the cases as they are cited in the treatises upon this subject, namely, Enc. Plead. and Prac., vol. 6, at page 667; 46 Amer. Dig., Century edition 1231, under title "Direction of Verdicts," § 375, etc.; and 5 Dig. U. S. Sup. Co. Rep. (L. Ed.), pp. 5679, etc.

In fact, it has been suggested to me by the well informed that Virginia, and possibly Tennessee, are the only States which have not established this practice by positive judicial pronouncement.

It is true, as stated in the article referred to, that our Supreme Court of Appeals said in Taylor *v.* B. & O. R. Co., 108 Va. 817, that to direct a verdict, as the trial court did in that case, "is not in accordance with the accepted practice of this State," still, so far from condemning the action of the trial court, for its rulings, it was sustained and the judgment affirmed. Whittle, Judge, speaking for the court, said, "for it is the well-settled rule of the court, that where it appears that the plaintiff is not entitled to recover in any view of the case, he cannot have been prejudiced by an erroneous instruction."

A similar case, with same ruling, is that of Hargrave's admr. *v.* Shaw Land Co., 4 Va. Appeals 251.

I have heard that it is the inclination of most of the judges of the Circuit Courts of Virginia to direct verdicts in proper cases. If they cannot be allowed to do so now, under our practice and procedure, will they be more than dummies during a trial? Shall they sit idly and wait to see what a jury will do, and then, if its verdict is contrary to the evidence, or not supported by the evidence, or contrary to law, set it aside, and order a new trial with all its consequences? It is well known to the profession that judges do not like to dispense with a jury, as can be done, and try an issue of fact, and even when requested, often decline; so when they direct verdicts they do so because of the duty devolving upon them in the due administration of the law and business. Our judges are well trained and are cautious, and bend their energies to prevent the "law's delay."

The trend of our law procedure has reached the logical necessity of directing verdicts. In this jurisdiction, the rule is well settled that it is for the court to expound the law and for the jury to pass upon the facts. Newport News R. Co. *v.* Bradford, 100 Va., at page 338.

This rule is universal. 11 Enc. Plea. & Prac. 57-58. In Delaplane *v.* Crenshaw, 15 Gratt. 457, it was held that the court may stop counsel from arguing against the ruling of the court,

Judge Lee saying: "It is a duty which the court owes to its own self-respect as well as to the speedy administration of justice not to allow counsel to discuss before the jury the same matter which has already been decided."

It is the duty of the jury to obey instructions, not only in civil, but criminal cases. Newport News Ry. *v.* Bradford, 100 Va. 231; Brown *v.* Commonwealth, 86 Va. 471.

Counsel not allowed to read books to jury. 100 Va. 231.

The doctrine that if a scintilla of evidence be produced by a litigant to maintain the issue on his part (a doctrine that abused our patience so long), it must go before the jury, was abolished in C. & O. R. Co. *v.* Stock, 104 Va. 108.

Now if the litigant, the lawyer and the jury must respect and obey the law, who has the power to make them do so? Some functionary must inevitably be clothed with the power, and that power is the judge who must govern *by and under the law.* It follows, therefore, that he must have the authority to do so. Our progressive trial judges are growing tired of being dummies.

INSTANCES SUGGESTED WHERE VERDICTS SHOULD BE DIRECTED.

Where the evidence of either party contravenes a statute or positive rule of the common law, and there is no legal evidence to evade these statutes or rules, for example, statutes of limitation, frauds and perjuries; parol evidence affecting writings.

Where the evidence develops a case obnoxious to public policy, or a legal moral precept, for example, the maxim, *ex turpi contractu non oritur actio.* As in the cases of Oscanyan *v.* Winchester Arms Co., 103 U. S. 261; Williams *v.* Kendrick, 105 Va. 791.

When there is no evidence to support the opposite theory.

When opposite theory is supported by no evidence of an *essential* fact.

When there is no conflict in the evidence or question as to its credibility; unless different conclusions may be drawn.

Where the evidence is undisputed, or is of such a conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a different verdict.

Where the testimony and all the fair inferences which the

jury can justly draw therefrom, are insufficient to support a different verdict, a verdict may be directed in favor of one of the parties.

Where writings involving contracts or disposition of property, and their validity is not questioned—leaving only a question of construction.

Where a demurrer to evidence would be sustained.

If after considering the evidence, it shall appear that there is no room for a difference of opinion among reasonable men, then a demurrer to evidence will be sustained. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 36 L. Ed. 485; Kimball and Fink *v.* Friend's admr., 95 Va. 125; N. & W. Ry. Co. *v.* Dean's admr., 107 Va. 505. It follows, therefore, that in such case a verdict should be directed. Raines *v.* Railway Co., 39 W. Va. 5, 19 S. E. 565.

For rules governing the directing of verdicts, see vol. 5, Dig. U. S. Supreme Court, Reports (L. Ed.), pp. 5679, etc.; 6 Enc. Plea. & Prac. 667-683, etc.; 46 American Dig. (Century Edition), pages 1233-1269.

The learned gentleman who wrote the article referred to seems to proceed upon the theory, and that alone, that the direction of a verdict by the trial court is an *absolute denial of a trial by jury*. I submit that this is an incorrect assumption. This course is no more the assumption of the functions of a jury than is the demurrer to evidence, or the right to set aside the verdict of the jury. The majority of the cases cited by the gentleman relate to the right to have the jury *pass upon disputed facts* and the weight of the evidence, which no court or lawyer will deny.

SOME REASONS FOR THE PRACTICE OF DIRECTING A VERDICT.

In the case of Richard & Jacob Pleasants *v.* Fant, 89 U. S. 116-123, 22 L. Ed. 780 (1875), the Supreme Court says, at page 783:

"It is the duty of a court in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the

issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict."

This case makes reference to a former one (Improvement, etc., R. R. Co. *v.* Munson, 81 U. S. 442-452, 20 L. Ed. 867) as follows:

"No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiffs case, it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

"But, as was said by this court, in the case of The Improvement Co. *v.* Munson, 14 Wall. 448 (81 U. S. 872), recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there

is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

"The English cases there cited fully sustain the proposition. See Jewell *v.* Parr, 13 C. B. 916; Toomey *v.* L. & B. R. Co., 3 C. B. (N. S.) 146; Ryder *v.* Wombwell, 4 L. R. Exch. 33, and the decisions of this court have generally been to the same effect."

The following is an extract from Improvement, etc., Co. *v.* Munson, above cited (20 L. Ed., at page 872):

"When a prayer for instruction is presented to the court and there is no evidence in the case to support such a theory it ought always to be denied, and if it is given, under such circumstances, it is error; for the tendency may be and often is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Ryder *v.* Wombwell, Law Rep., 4 Ex. 39; Giblien *v.* McMullen, L. Rep., 2 P. C. App. 335. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. Jewell *v.* Parr, 13 C. B. 916; Toomey *v.* L. & B. R. R. Co., 3 C. B., N. S., 150; Wheelton *v.* Hardesty, 8 Ell. & Bl. 266; Schuchardt *v.* Allen, 1 Wall. 369 (68 U. S. XVII. 646)."

It will be seen from these decisions that the English cases fully sustain them; yet it would seem from the views of the writer of the article in question that he is of opinion that the directing of verdicts does not obtain in the British Courts.

The article refers to Ross *v.* Gill, 1 Wash. 89 (decided in 1792), and to 4 Min. Inst.; and it is supposed that the last reference is to page 958, 3 Ed. (Min. Ins.), where the following statement is made:

"In England, and in some of these States, it is a frequent prac-

tice for the courts to direct the plaintiff to suffer a nonsuit whenever they think the evidence palpably insufficient to maintain the action, and that without consulting the wishes of the plaintiff. In Virginia, and in the United States Courts, no such practice has ever prevailed. Although the courts may advise a non-suit, they cannot coerce it. The plaintiff may appear when he is called, and his appearance must be recorded, which puts a non-suit quite out of the question."

These references are no authority for refuting the doctrine here contended for. They relate wholly to what is called a *non-suit*. The profession knows that a non-suit in Virginia must be voluntary and cannot be enforced by a court, and that no appeal lies from it.

There is nothing unfair in the directing of verdicts. It may be done for either party. It is no suppression of the skill of the "jury lawyer." He must be *advocate* enough to win his verdict and a *lawyer learned enough* to hold the judgment of the court on it. That is all.

STATUTE PROHIBITING MORE THAN TWO NEW TRIALS.

This statute is for the purpose of ending litigation. If one trial before a jury will accomplish this, where is the vice in it? Let us suppose that able lawyers on both sides know how to present and do present perfect pleadings; that they are diligent and fair enough to their clients to present all the evidence to maintain their respective issues—that a trial is had alone upon the merits of the case; that the defeated litigant obtains a writ of error to the Appellate Court and the judgment of the trial court is reversed alone upon the want of merit in the evidence adduced, and a new trial is awarded. The defeated party, to succeed in the next trial, must make a new case, either by having his witnesses change their sworn testimony or get others who will make a different case. It takes no argument to show to what end this will lead. If the same case is made on the new trial, shall the trial judge sit dumbly and blindly and let a similar verdict be rendered, then set it aside? Or shall he direct a verdict? This question answers itself.

Our trial courts must judge, it called upon, whether the facts in a given case before them sustain the verdict of the jury, and

their ruling is a subject of review by the Appellate Court. If the court of last resort determines the question, as they frequently do, wholly upon the merits of the case as developed by the facts, this pronouncement becomes the law of the case upon the record then made. If the trial judge has proper respect for the appellate tribunal, and if the second trial does not actually change the merits and facts of the first, he should treat the case as *res judicata,* in effect; then why unjustly expose the successful litigant in the first proceedings to a second trial or to an attempt to corral him into a third verdict? The prohibition of more than two trials was not intended to promote the success of a mere *legal game*, but to end litigation. Two unjust verdicts will not make a third unjust one, right.

True, the litigant, the merits of whose case have been approved, may demur to the evidence, but if he is guaranteed two modes of obtaining justice, why should he be bullied into a demurrer, with all its attributed "holy terrors," and the certainty that when the question of dollars and cents, whether flowing from actions *ex delicto* or *ex contractu* is, at last, to be left to the jury, they will give the limit, if the case is taken from them? This article mistakenly declares that the direction of verdicts is violative of constitutional rights. (Section 11, Va. Bill of Rights.) If this be true, how has the chancellor ever been allowed to determine suits between man and man without a jury? How has the demurrer to evidence been allowed to stand from time out of mind? But it has, and that where a special statute required a jury. Reed & McCormick *v.* Gold, 102 Va., at page 51. Why is a *nisi prius* court allowed to preside over a jury, record its verdict, then annul it? Why is the direction of verdicts universal in the Federal Courts, when the constitution of the United States guarantees a trial by jury in these courts?

The fundamental law of the State of West Virginia, provides for trial by jury, yet its courts have long since established the practice of directing verdicts. Rains *v.* Railway Co., 39 W. Va. 50, 19 S. E. 565.

The answer is that this is one of the means of attaining justice, establishing the law and of maintaining the balance of power

between courts and juries, and that no court has ever declared the practice unconstitutional. In fact, so strongly has the right of the court to administer and expound the law of a given case been upheld, that in States where it has been encroached upon by legislative enactment, it has been held unconstitutional. State *v.* Wright, 53 Me. 338; Com. *v.* Anthes, 5 Gray (Mass.); U. S. *v.* Morris, 1 Curt. (U. S.) 53; Enc., Plea. & Prac. 77.

In conclusion it may be said with the approval of the bench, and majority of the bar, that the present practice of imposing upon the jury instructions almost without limit, often irreconcilable to the lay mind, causes more mistrials and unjust results than any other element of the trial, and more reversals, and that any legitimate act upon the part of courts that will tend to remedy this should be encouraged and upheld.

SAMUEL C. GRAHAM.

Tasewell, Va.